IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4963

Summary Calendar

ARNOLD DAVILA,

Plaintiff-Appellant,

v.

JAMES ANDY COLLINS,
Etc., ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Texas
(91 CV 220)

September 3, 1993

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Plaintiff-Appellant Arnold Davila, a Texas prisoner currently in the custody of the Texas Department of Criminal Justice (TDCJ), appeals from the magistrate judge's dismissal of his pro se, in forma pauperis civil rights complaint. Finding no reversible error, we affirm.

---

[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

On September 22, 1989, Arnold Davila received a disciplinary report and was placed in pre-hearing detention. TDCJ officials alleged that Davila had attempted to pass a list of legal citations to another inmate, David Ruiz, without using authorized prison mail procedures. Davila was charged with "trafficking and trading," as well as soliciting a prison official to violate TDCJ rules. Jerry Hickman was appointed as "counsel substitute" for Davila and prepared an investigation work sheet regarding the disciplinary report.

Seven days later, on September 29, TDCJ conducted an initial disciplinary hearing, at which Davila was present. When Davila became argumentative, however, the hearing officer excluded him. The disciplinary hearing was thereafter continued until October 2, 1989, to allow Hickman extra time to question witnesses whose names had been submitted by Davila.

On October 2, the disciplinary hearing continued without Davila, but Hickman was present to argue on his behalf. After hearing evidence from both sides, the hearing officer dropped the charges of trafficking and trading, but found Davila guilty of soliciting an officer to violate TDCJ rules. As a result of this finding, Davila lost his class standing as a State Approved Trusty III, some good time credit, and, for forty-five days, his commissary privileges. In addition, he was placed in administrative segregation for fifteen days.

On April 19, 1991, Davila filed this pro se, in forma pauperis action in federal district court pursuant to 42 U.S.C. § 1983. He argued that the disciplinary proceedings held on September 29 and October 2, 1989, were constitutionally defective. Among other things, he argued that his due process rights were violated when he was not allowed to attend the hearing on October 2, 1989.

The district court referred this matter to a magistrate pursuant to 28 U.S.C. § 636(b)(1) and (3). Thereafter, at a Spears hearing[1] conducted by the magistrate, the parties consented to have the matter tried before the magistrate in accordance with 28 U.S.C. § 636(c). They expressly waived their right to proceed before a judge of the United States District Court and agreed that any appeal from the judgment would be directly to the Court of Appeals.

The magistrate held an expanded evidentiary hearing on September 24, 1991, which was tantamount to a trial. The parties were allowed to present evidence, call witnesses, and cross-examine witnesses from the opposing side. The magistrate judge then issued a memorandum opinion, in which she concluded that Davila's claims should be dismissed with prejudice as being frivolous within the meaning of 28 U.S.C. § 1915(d). The magistrate judge reasoned that Davila's disruptive behavior at the first disciplinary hearing justified his exclusion at that hearing. With regard to the second disciplinary hearing, the

[1] See Spears v. McCotter 766 F.2d 179 (5th Cir. 1985).

magistrate held that--even assuming Davila was not offered a chance to attend the hearing--the exclusion did not rise to the level of a constitutional violation.

On appeal, this court affirmed in part, vacated in part, and remanded. We specifically held:

> In the absence of a finding that Davila voluntarily absented himself from the [October 2] evidentiary hearing, . . . the magistrate judge's conclusion that the second part of the hearing comported with due process is flawed. The portion of the order concerning Davila's opportunity to attend the second part of his hearing is vacated, and the case remanded, for the limited purpose of having the court make a finding on this issue, and in light of that finding, determine whether the second hearing met due process requirements.

The magistrate judge complied with our instructions and, on remand, expressly found--on the basis of the prior evidentiary hearing--that "Davila was offered an opportunity to attend the disciplinary hearing on October 2, 1989, but refused to do so." The magistrate then dismissed Davila's complaint with prejudice, again holding that it was frivolous pursuant to § 1915(d). This appeal followed.

II.

Davila raises several arguments on appeal. He argues, first, that the district court erred in failing to make a de novo review of the magistrate's memorandum opinion and order. He also contends that the magistrate erred in assessing his credibility and erroneously relied on unsworn testimony. For the reasons discussed below, we reject these arguments.

Initially, we note that the magistrate judge's dismissal of Davila's complaint was not, technically speaking, a frivolousness dismissal pursuant to 28 U.S.C. § 1915(d). The magistrate judge's decision to dismiss the complaint occurred after an expanded evidentiary hearing, which, as noted above, was tantamount to a trial. Indeed, by remanding Davila's due process claim with regard to the second disciplinary hearing for further consideration, we effectively recognized that this claim had both an arguable basis in law and fact. Because it was an arguable claim, it could not have been dismissed as frivolous within the meaning of § 1915(d). See Neitzke v. Williams, 490 U.S. 319, 325 (1989) ("[A] complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact."); see also Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (recognizing that a court may dismiss a claim as factually frivolous only if the facts alleged are clearly baseless--a category encompassing allegations that are "fanciful," "fantastic," and "delusional").

The magistrate's decision dismissing Davila's due process claim with respect to the second disciplinary hearing is more appropriately viewed as a decision rendered after a full trial on the merits. As previously noted, the parties expressly consented to a trial by the magistrate pursuant to 28 U.S.C. § 636(c). And, the magistrate's finding with respect to whether Davila was voluntarily absent from the October 2, 1989 hearing was rendered only after an expanded evidentiary hearing where the parties were

permitted to present evidence, testify, and cross-examine witnesses.

Having clarified the nature of the district court's dismissal, we now proceed to Davila's arguments on appeal. Because the magistrate's judgment was entered under 28 U.S.C. § 636(c), we review it under the same standards that we review judgments entered by a district court. See Gulf States Enterprises v. R.R. Tway, Inc., 938 F.2d 583, 586 (5th Cir. 1991). That is, "[c]onclusions of law are reviewed de novo and findings of fact are upheld unless they are clearly erroneous." Id.

We reject Davila's claim that the district court erred in not conducting a de novo review of the magistrate's determination. Because the parties consented to have case tried before the magistrate, Davila's contention in this regard is patently without merit. The magistrate's decision to dismiss Davila's due process claim constitutes, for all practical purposes, the final judgment of the district court. Moreover, the parties expressly agreed that any appeal from the magistrate's judgment would lie with this court--not the district court. Cf. Mississippi River Grain Elevator, Inc. v. Bartlett & Co., Grain, 659 F.2d 1314, 1317 (5th Cir. Unit A 1981) (concluding that the district court did not have to conduct a de novo review of the magistrate's findings where the parties (a) elected to submit the matter for decision by a magistrate as a

special master and (b) agreed to accept the decision of the magistrate as the decision of the district court).

As for Davila's argument that the magistrate's credibility determinations are erroneous, we conclude that it is also without merit. The magistrate's credibility findings--specifically, her decisions (a) to credit Hickman's testimony that Davila was afforded an opportunity to attend the October 2, 1989 disciplinary hearing, and (b) to discredit Davila's testimony to the contrary--are plausible in light of the record. Therefore, they are not clearly erroneous. See Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985).[2]

Finally, we address Davila's contention that the magistrate judge erred in considering "unsworn testimony from Officer Sharp indicating that [Davila] had refused to attend the second part of the disciplinary proceeding." In this regard, Davila appears to

---

[2] We note that Davila has not argued that the magistrate judge, by effectively conducting a bench trial on his due process claims, deprived him of his Seventh Amendment right to a jury trial. Had he raised this argument, it would present a serious question. Admittedly, parties who consent to have their case tried before a magistrate pursuant to 28 U.S.C. § 636(c) may, at the same time, waive their Seventh Amendment right to a jury trial. See, e.g., McCarthy v. Bronson, 906 F.2d 835, 840-41 (2d Cir. 1990), aff'd, 111 S. Ct. 1737 (1991). But on the facts of this case, it would be a close question as to whether Davila waived his right to a jury trial. After all, he requested a jury trial when he filed his complaint in district court and may well have been unaware that, when he consented to have the case tried in front of the magistrate judge, the magistrate was going to resolve disputed fact issues. Because Davila does not raise this complaint on appeal, however, we need not decide whether, by failing to object to the magistrate's decision to conduct a bench trial, he waived his Seventh Amendment right to a jury trial. See Casperone v. Landmark Oil & Gas Corp., 819 F.2d 112, 116 (5th Cir. 1987).

be challenging Hickman's testimony that Sharp unsuccessfully attempted to escort Davila from his cell to the October 2 disciplinary hearing, as well as an inter-office communication signed by both Sharp and Hickman, which indicated that Davila voluntarily refused to attend the October 2 disciplinary hearing. Sharp did not personally testify at any of the hearings conducted by the magistrate judge.

We conclude that the magistrate judge did not commit reversible error by considering Hickman's testimony or the inter-office communication signed by Sharp and Hickman. Davila did not object to Hickman's testimony regarding Sharp's effort to bring him to the hearing; and we are unable to conclude that the admission of this evidence rises to the level of plain error. Moreover, even though Davila objected to the inter-office memorandum signed by Sharp and Hickman on hearsay grounds, we cannot say that the magistrate's decision to admit and consider the evidence warrants reversal. Even if we assume arguendo that it was error for the magistrate to admit the inter-office memorandum, the error was harmless in light of Hickman's testimony that, when he personally went to Davila's cell and asked him to attend the October 2 disciplinary hearing, Davila refused.

III.

As the above discussion indicates, the magistrate judge did not clearly err in finding that Davila voluntarily chose not to

attend the October 2, 1989 disciplinary hearing. On these facts, the magistrate judge correctly concluded that Davila's due process rights were not violated. See Moody v. Miller, 864 F.2d 1178, 1180 (5th Cir. 1989). We therefore AFFIRM the magistrate judge's decision dismissing Davila's § 1983 complaint.